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Gerard Hogan
The Supreme Court of Ireland

Spring-Cleaning the American Legal Pantheon?

Reputations Rivalled: Justices Harlan the First and Holmes & Justices Frankfurter and Harlan the Second

Gerard Hogan[*]

In the general common law world, few things are more contestable than what constitutes judicial greatness. Is it the capacity to anticipate developments in the law or to champion new ideas that, in time, will become accepted? Or is it the elegance of judicial style? Or is it a combination of some or all of these things? These are the subjects of endless jurisprudential debates. Yet no matter where you stand in this debate, one thing is clear: the U.S. Supreme Court has been fortunate in having had among its ranks some of the greatest judges which the common law world has ever produced.

In this Article, I wish to explore the reputation of four great justices of that Court. While Oliver Wendell Holmes has his critics, his greatness can scarcely be denied. Yet I contend that that very aura which surrounds Holmes has somewhat obscured the real achievements of one of his erstwhile colleagues, John Marshall Harlan, who may be said to have outshone him in certain respects. So the first part of this Article seeks to compare and contrast Holmes and the first Harlan and to inquire why Holmes has won the prize of history, while Harlan's reputation nowadays rests almost exclusively on his famous dissent in Plessy v. Ferguson.

In the second part of this Article, I seek to compare and contrast the achievements of Felix Frankfurter with those of the other John Marshall Harlan, the grandson of the first Harlan. I contend that Frankfurter's inflexibility, dogmatism, and personal vanity prevented him from achieving his full judicial potential and that, in this respect, he has been outshone by the Harlan II, whose flexibility, modesty, and a nuanced understanding of

* Judge of the Irish Supreme Court. Cooney & Conway Judge-in-Residence, Loyola University Chicago School of Law. This work draws upon two lectures that I delivered at the Loyola University Chicago School of Law on September 18 and 19, 2023. I remain very grateful to Professor Barry Sullivan for his thoughtful invitation to deliver these lectures and for his comments on an earlier daft of these papers. Gerard Hogan, Cooney & Conway Judge in Residence Lectures (Sept. 19 & 20, 2023).

the judicial role has distinguished him as one of the great Justices of the post-World War II era.

I. HOLMES AND THE ELDER HARLAN COMPARED

On the evening of Saturday, October 14, 1911, Oliver Wendell Holmes found the time to write to one of his Irish friends, Alice Stopford Green.[1] Holmes had suddenly found the time to write the letter because John Marshall Harlan died earlier that morning, and the long "laborious conference[s]" that the U.S. Supreme Court judges used to have every Saturday, were suddenly canceled.[2] Holmes was forthright about Harlan—whom he had previously described "as the last of the tobacco-spittin' judges"[3]—saying that although "he had some of the faults of a savage" he was nonetheless charming: "On my 70th birthday who but he bethought himself to put a little bunch of violets on my desk in Court?"[4] Thus, there was a curious relationship between the two most important figures on the Court between the end of the Civil War and the First World War.

And they were the two most important figures from that era. Many of their contemporary colleagues from the Gilded Age, even Chief Justices, have all but vanished from modern-day memory. Who now remembers figures such as Morrison Remick Waite (Chief Justice 1874–'88)[5] or Melville W. Fuller (Chief Justice 1888–1910),[6] while Rufus W.

1. Letter from Oliver Wendell Holmes, Assoc. Justice, U.S. Supreme Court, to Alice Stopford Green (Oct. 14, 1911), *in* THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR., 3, 3 (Richard A. Posner ed., 1992) [hereinafter THE ESSENTIAL HOLMES]. Ms. Green was prominent in the Irish nationalist revolutionary movement, and she would later serve as a member of the first Irish Senate from 1922 until her death in 1929. She was described as a "mordant, well-educated, civilized woman of startling will-power and dazzling wit" who was "passionately dedicated to the cause of Irish Nationalism" and a woman of "intensely anti-English and anti-Imperialist persuasion." RENÉ MACCOLL, ROGER CASEMENT: A NEW JUDGMENT 50 (1957).

2. Letter from Oliver Wendell Holmes, *supra* note 1, at 3.

3. TINSLEY E. YARBROUGH, JUDICIAL ENIGMA: THE FIRST JUSTICE HARLAN, at viii (1995).

4. Letter from Oliver Wendell Holmes, *supra* note 1, at 3 ("The old boy had outlived his usefulness—but he was a figure the like of which I shall not see again."). In a later letter to the noted British jurist, Sir Frederick Pollock, on April 5, 1919, Oliver Wendell Holmes, described John Marshall Harlan as a "sage" and "although a man of real power, [Harlan] did not shine either in analysis or generalization . . . ." Letter from Oliver Wendell Holmes, Assoc. Justice, U.S. Supreme Court, to Sir Frederick Pollock (Apr. 5, 1919), *in* 2 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK 1874-1932, 7, 7 (Mark DeWolfe Howe ed., 1961). For a comparison between the "emotional" Harlan I and the "dispassionate" Holmes, see Samuel H. Pillsbury, *Harlan, Holmes and the Passions of Justice*, *in* THE PASSIONS OF LAW 330, 330–62 (Susan A. Bandes ed., 1999).

5. Save perhaps as author of one of the very first First Amendment cases dealing with freedom of religion. Reynolds v. United States, 98 U.S. 145, 166 (1878) (holding that a federal law prohibiting polygamy did not infringe the free exercise guarantee).

6. Thus, Professor Owen M. Fiss's eighth volume of *The History of the Court* commences with the following vivid passage:

Peckham's reputation rests—if that is quite the correct word—on the fact that he happened to author the majority opinion in *Lochner v. New York*.[7] The parade of dull, colorless corporate lawyers favored by pretty much all presidents of this period, from Ulysses S. Grant onwards, left little enough impression, even at the time. Figures such as Ward Hunt (Grant), Samuel Blatchford (Chester A. Arthur), and George Shiras, Jr. (Benjamin Harrison) have all but vanished from history. If they are remembered at all, it is for decisions which are nowadays regarded as notorious.[8]

It is true, of course, that John Marshall Harlan is nowadays well remembered. But it is really only for one opinion—his celebrated dissent in *Plessy v. Ferguson*.[9] As I hope to show, there was, however, a good deal more to Harlan than just one opinion. Yet he, in turn, is overshadowed by the most iconic figure in U.S. law, Oliver Wendell Holmes.[10] Although both Justices had exceptionally long tenure—Harlan from April 1877 to October 1911 and Holmes from December 1902 to January 1932—Holmes made a permanent, indelible impact on the U.S. Supreme

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> The two-hundred-year history of the Supreme Court has been divided among a dozen or more chief justices. Each segment has achieved a separate identity, each bears the name of the chief justice, and each is referred to as a "Court." Each Court has been graded, and some have been deemed great, others mediocre, some quite dismal. By all accounts, the Court over which Melville Weston Fuller presided, from 1888 to 1910, ranks among the worst.

8 OWEN M. FISS, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: TROUBLED BEGINNINGS OF THE MODERN STATE, 1888–1910, at 3 (1993).

7. Lochner v. New York, 198 U.S. 45, 52 (1905) (Peckham, J.).

8. Thus, Ward Hunt, sitting as a Federal Circuit judge, presided over the trial of Susan B. Anthony who was charged with having voted on Election Day in November 1872. *See* N.E.H. HULL, THE WOMAN WHO DARED TO VOTE: THE TRIAL OF SUSAN B. ANTHONY 63, 157 (2012). Rebuffing her arguments regarding the effect of the then newly enacted Fourteenth Amendment, Hunt directed the jury to find her guilty of the offense of having voted illegally. *Id.* at 157. Perhaps another reason why Hunt has vanished from memory was that he was incapacitated for five of his ten years of service. He resigned once Congress made special provisions for his pension entitlements. DAVID N. ATKINSON, LEAVING THE BENCH: SUPREME COURT JUSTICES AT THE END 61 (1999).

9. Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting) ("The white race deems itself to be the dominant race in this country. . . . But in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.").

10. This is a widely accepted view. *See, e.g.*, Richard A. Posner, THE ESSENTIAL HOLMES, *supra* note 1, at ix ("Oliver Wendell Holmes is the most illustrious figure in the history of American law.").

Court in a way that Harlan did not. Part of this, doubtless, rests on the sense of glamour that attended Holmes: his tall, handsome visage; his patrician background; his military record in the Civil War; his unquestioned status as a profound jurist; and, perhaps, above all, his memorable, eloquent judgments for which he is justly revered. Holmes made three long-lasting contributions to U.S. jurisprudence: (1) his critique of substantive due process in *Lochner v. New York* and subsequent case law,[11] (2) his revitalization of the First Amendment in a series of great post-World War I decisions,[12] and (3) his attack on the idea of a general federal common law in cases such as *Black & White Taxi Co. v. Brown & White Taxi Co.*[13]

To this list, one might add the development of federal habeas corpus in cases such as *Moore v. Dempsey*, a decision that augmented the duty of federal courts to scrutinize criminal convictions obtained in state courts in the face of mob violence and the torture and gross intimidation of witnesses.[14] But this was in the last decade of Holmes's long judicial career, and the citation of this[15] tends to gloss over the fact that, as we shall shortly see, Holmes's record on civil rights and the protection of minorities was, on the whole, weak. This is where Harlan stands out in contrast to Holmes. It is, of course, easy to be critical in a modern era of decisions such as *Cumming v. Richmond County Board of Education*[16]—

11. *Lochner*, 198 U.S. at 57 ("It is a question of which of two powers or rights shall prevail,—the power of the state to legislate or the right of the individual to liberty of person and freedom of contract. The mere assertion that the subject relates, though but in a remote degree to the public health, does not necessarily render the enactment valid."); *see also* Barry Friedman, *The History of the Countermajoritarian Difficulty, Part Three: The Lesson of* Lochner, 76 N.Y.U. L. REV. 1383, 1454 (2001) ("What we can now see, looking back at the *Lochner* era, is that sharp disagreement with legal outcomes easily can lead to claims of legal illegitimacy. . . . When feelings of social illegitimacy are strong enough, the claim easily may be made that the judges are acting illegitimately in a legal sense.").

12. *See, e.g.*, Abrams v. United States, 250 U.S. 616, 624–25 (1919) (Harlan, J., dissenting) (arguing that the defendant's speech did not create a clear and present danger); Schenck v. United States, 249 U.S. 47, 51 (1919) (Harlan, J., dissenting) (proposing the notion of "clear and present danger" as a means of evaluating whether speech is protected or not given the circumstances in which it is spoken).

13. Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518, 532–36 (1928) (Harlan, J., dissenting).

14. Moore v. Dempsey, 261 U.S. 86 (1923).

15. There are other cases affirmative of minority rights. *See, e.g.*, Nixon v. Herndon, 273 U.S. 536, 540–41 (1927) (holding that all-white primaries violated the Fourteenth Amendment).

16. *See* Cumming v. Richmond Cnty. Bd. Educ., 175 U.S. 528, 545 (1899) (holding that the county tax which supported high schools open only to Caucasian students was legal); *see also* RICHARD KLUGER, SIMPLE JUSTICE 122 (1975) ("*Cumming*, the most vacillating opinion on racial matters ever written by John Marshall Harlan the Elder . . . ."). But even here it may be said that the facts of *Cumming* were confused and there was, as such, no argument that the decision of a school board in closing a prestige black school and diverting the funds for broader educational uses

in which Harlan sanctioned (or, at least, appeared to sanction) the *de jure* segregation in public schools—and his record in this area is far from perfect. Yet if your test for judicial greatness is whether the judge in question could move beyond the conventional wisdom and prejudices of the day and articulate a vision for the future, Harlan must be regarded as great.

One might think it odd that a Justice who grew up in an antebellum slave state, Kentucky, and who himself was part of a slave-holding family would prove to be more sensitive to the rights of African Americans than that of a Yankee Republican from Boston who was wounded three times in the Civil War.[17] One must not, of course, make too much of this. Harlan was very close to his mixed-race brother, Robert, and he, himself, had served in the Union army.[18] Yet if Harlan was more sensitive to the rights of minorities—and the record is impossible to dispute—then one has to ask oneself why Holmes has to date not only claimed the prize of history but also that of popular acclaim.

A. Harlan and Holmes on the Rights of Minorities

I do not propose dwelling on the well-known Harlan dissents in the *Civil Rights Cases* and *Plessy v. Ferguson*.[19] It is sufficient to say that in the *Civil Rights Cases*, Harlan was the sole dissentient to protest at Justice Bradley's opinion, which effectively eviscerated large parts of the Thirteenth and Fourteenth Amendments. The majority effectively held that the Fourteenth Amendment did not reach what Bradley, in his opinion, regarded as purely private discrimination against African Americans in

had been motivated by racial discrimination, a point which Harlan himself strongly emphasized. By contrast, however, when the issue did squarely come before the Supreme Court in 1927 in *Gong Lum v. Rice*, it was treated in an unquestioning way as an authority for segregated education. *See* Gong Lum v. Rice, 275 U.S. 78, 85 (1927) (citing *Cumming* as a justification for the right of the state to "regulate the method of providing for the education of its youth . . . ."). It is perhaps striking that in *Gong Lum* the Court's three noted liberals—Holmes, Brandeis and Stone—all sat on their hands as Chief Justice Taft delivered an opinion which seemed emphatically to endorse the constitutionality of the segregated school system. *Id.* at 79. It was, after all, "more convenient to ignore obvious inequality than to challenge the entire system of Southern apartheid." ROBERT C. POST, THE TAFT COURT: MAKING LAW FOR A DIVIDED NATION 1921–1930, at 1451 (2024).

17. PETER S. CANELLOS, THE GREAT DISSENTER: THE STORY OF JOHN MARSHALL HARLAN, AMERICA'S JUDICIAL HERO 2 (2021) ("[T]here was within him a striking difference with the dozens of justices with whom he served over his thirty-four years on the court from 1877 to 1911. He saw things that they did not. He acted on impulses that they didn't share.").

18. *See* CANELLOS, *supra* note 17, at 4, 132–44.

19. The Civil Rights Cases, 109 U.S. 3, 26–62 (1883) (Harlan, J., dissenting); Plessy v. Ferguson, 163 U.S. 537, 552–64 (1896) (Harlan, J., dissenting).

areas such as hotels, restaurants, or theaters.[20] Harlan was uncompromising in his dissent, saying that the majority had sacrificed "by a subtle and ingenious verbal criticisms" the "substance and spirit" of the Thirteenth and Fourteenth Amendments.[21] In *Plessy*, Harlan again stood alone against the "separate but equal doctrine," famously saying that the Constitution was "color-blind" and "neither knows nor tolerates classes among citizens."[22] Yet to test this point regarding the comparative weakness of Holmes's records on these critical questions, we can look at a number of Supreme Court decisions from 1902 to 1911 when both Harlan and Holmes served together on that Court.

The first is *Giles v. Harris*,[23] decided in April 1903, a few months after Holmes joined the Court. Here, the allegation was that the State of Alabama had, more or less, openly drafted a new Constitution that disenfranchised black voters.[24] Reading the majority opinion of Holmes, this allegation does not appear to have been denied: the State of Alabama joined the issue on the jurisdictional issue, claiming that the relief sought lay beyond the judicial capacity to secure by court order. Why, then, did the plaintiff not succeed? The first answer—"[i]n an argument that bordered on sophistry"[25]—was that if the scheme was indeed fraudulent, then "how can we make the court a party to the unlawful scheme by accepting it and adding another voter to its fraudulent lists?"[26] The second answer was that a court of equity could not supervise the sort of relief claimed and—in an echo of the later reapportionment battles in cases such as *Colegrove v. Green*,[27] *Gomillion v. Lightfoot*,[28] and *Baker v. Carr*[29]—Holmes observed that "relief from a great political wrong, if done, as alleged [by a state of the Union] must be given by them or by the legislative and political department of the government of the United States."[30] To his credit, Harlan dissented on this jurisdictional

20. *See Civil Rights Cases*, 109 U.S. at 11 ("It does not authorize Congress to create a code of municipal law for the regulation of private rights . . . .").

21. *Id.* at 26 (Harlan, J., dissenting).

22. *Plessy*, 163 U.S. at 559.

23. Giles v. Harris, 189 U.S. 475, 493–504 (1903) (Harlan, J., dissenting).

24. *See id.* at 482–83 ("[T]his part of the constitution, as practically administered and as intended to be administered, let in all whites and kept out a large part, if not all, of the blacks . . . .").

25. STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES: A LIFE IN WAR, LAW AND IDEAS 414 (2019).

26. *Giles*, 189 U.S. at 486.

27. Colegrove v. Green, 328 U.S. 549 (1946).

28. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

29. Baker v. Carr, 369 U.S. 186 (1962).

30. *Giles*, 189 U.S. at 488. Contrast this remark with Holmes' later finding for the Court in *Nixon v. Herndon* that all-white primaries violated the Fourteenth Amendment when he stated in

issue, saying that the federal courts did indeed have jurisdiction, with Harlan stating that if the facts alleged were established, then "the plaintiff is entitled to relief in respect of his right to be registered as a voter."[31]

The second is *Berea College v. Kentucky*.[32] Berea College was, and is, a liberal arts college founded just before the Civil War by idealistic abolitionists who believed in integrated education. After the end of Reconstruction, Kentucky passed a law in 1904 requiring education to be segregated. When the college protested that compulsory segregation was wholly at odds with its founding philosophy, Holmes joined in a non-descript opinion from Justice Brewer, which upheld the constitutionality of the law.[33] Harlan's dissent was biting:

> Have we become so inoculated with prejudice of race that an American government, professedly based on the principles of freedom, and charged with the protection of all citizens alike, can make distinctions between such citizens in the matter of their voluntary meeting for innocent purposes simply because of their respective races? Further, if the lower court be right, then a State may make it a crime for white and colored persons to frequent the same market places at the same time, or appear in an assemblage of citizens convened to consider questions of a public or political nature in which all citizens, without regard to race, are equally interested. Many other illustrations might be given to show the mischievous, not to say cruel, character of the statute in question and how inconsistent such legislation is with the great principle of the equality of citizens before the law.[34]

As Weinberg put it, Harlan's dissent represented, as in *Plessy*, the Court's "sole voice of conscience," whereas Holmes: "concurring silently in the shameful judgment [of Justice Brewer], evidently chose to stick to his deferential principles. Who was 'the great dissenter' then?"[35]

In the two Alabama *Peonage Cases*,[36] Holmes's performance—and I speak as an admirer—was even worse. In *Bailey v. Alabama*, Harlan

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response to this argument that "[t]he objection that the subject matter of the suit is political is little more than a play upon words." Nixon v. Herndon, 273 U.S. 536, 540 (1927).

31. *Giles*, 189 U.S. at 504.

32. Berea Coll. v. Kentucky, 211 U.S. 45 (1908).

33. This was in part because Justice Brewer apparently believed that corporate entities had no constitutional rights as such: "In creating a corporation a State may withhold powers which may be exercised by and cannot be denied to an individual." *Id.* at 54. But just as with *Giles v. Harris*, this was simply another example of the sophistic techniques often used by a majority in the Fuller, White, and Taft Courts to rationalize and even to excuse patent racial discrimination.

34. *Berea Coll.*, 211 U.S. at 69 (Harlan, J., dissenting).

35. Louise Weinberg, *Holmes' Failure*, 96 MICH. L. REV. 691, 709 (1997).

36. *See* United States v. Reynolds, 235 U.S. 133, 150 (1914) (declaring unconstitutional, a state statute that permits private employers to hire convicts as laborers without imposing any restrictions on the control employers can exert over the convicts); Bailey v. Alabama, 219 U.S. 219, 244–45

joined Hughes's majority opinion in holding that Alabama's peonage statute violated the Thirteenth Amendment,[37] but Holmes dissented, saying that there was "no reason why the State should not throw its weight on the side of performance" of the contract.[38] His somewhat curmudgeonly and grudging concurring judgment in *United States v. Reynolds* only partially mitigated this.[39] While he still did not think that criminalizing breaches of employment contracts amounted to a breach of the Thirteenth Amendment, he was inclined to think that the Alabama legislature must have foreseen that its employment statutes would lead to peonage because "impulsive people with little intelligence or foresight may be expected to lay hold of anything that affords a relief from present pain even though it will cause greater trouble by and by."[40] It is hard to see this concurrence as other than a form of condescending elitism. Over and above the pure jurisprudential theory as to the limits of a State's capacity to criminalize a breach of a contract, lay the reality of the then widespread practice of the Southern chain-gangs, the foreman's whip and the use of criminal-surety statutes to conscript poor African Americans into forced labor. This, at its most fundamental, was what the Thirteenth Amendment sought to forbid.[41]

B. Harlan and Free Speech

You might think that Harlan's legacy was confined to the area of the protection of minorities. But even in the field of First Amendment protection, he may be said to have outscored Holmes. The leading case

(1911) (striking down an Alabama law that made the refusal or failure to perform contract labor without refunding the money or paying for property received prima facie evidence of criminal conduct as conflicting with the Thirteenth Amendment). For a discussion of the *Peonage Cases* of the Progressive era, starting with some background on the history of coerced Black labor in the South, see Michael J. Klarman, *Race and the Court in the Progressive Era*, 51 VAND. L. REV. 881, 921 (1998).

37. Bailey v. Alabama, 219 U.S. 219, 245 (1911).

38. *Id.* at 247 (Holmes, J., dissenting).

39. United States v. Reynolds, 235 U.S. 133, 150 (1914) (Holmes, J., concurring).

40. *Id.* This brought forward protests even from Holmes's admirers. Thus, writing in 1943, Max Lerner observed: "Holmes's dissent has struck many commentators as legalistic in the worst sense of legalism. While he goes through a rigorous train of reasoning . . . it is of the sort which pays homage to the forms without going beyond them to the social reality." MAX LERNER, THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS 338 (1943). As Professors Alexander Bickel and Benno Schmidt put it, "The detached logic of the dissent seems amazing in view of Holmes' preachments that law must be judged as experience." ALEXANDER M. BICKEL & BENNO C. SCHMIDT, JR., THE JUDICIARY AND RESPONSIBLE GOVERNMENT 1910–1921, at 868 (1984).

41. *See generally* BICKEL & SCHMIDT, *supra* note 40, 820–908.

here is *Patterson v. Colorado*,[42] one of the very first free speech cases ever to come before the Supreme Court. Here, Patterson, a former U.S. Senator and editor of the *Rocky Mountain News*, presided over the publication of an article criticizing the Colorado Supreme Court for what it claimed was a series of partisan decisions favoring Republicans in election cases.[43] A cartoon showed the Chief Justice of the Colorado Court as "The Lord High Executioner"—from W. S. Gilbert and Arthur Sullivan's *The Mikado*[44]—presiding over the execution of various Democratic personages, along with the arresting headline: "If the Republican Party has overlooked anything from the Supreme Court it will now please proceed to ask for it."[45] Holmes wrote the majority opinion upholding Patterson's contempt citation, while Harlan (joined in part by Justice Brewer) dissented.[46] The contrast between the two opinions could not be starker.

Holmes was completely unmoved by any arguments premised on the idea that the First Amendment changed the common law rule to seditious libel and criticism of the judiciary.[47] Holmes also left undecided the issue of whether, as against the States, it had been incorporated by the Fourteenth Amendment:

> We leave undecided the question whether there is to be found in the Fourteenth Amendment a prohibition similar to that in the First. But even if we were to assume that freedom of speech and freedom of the press were protected from abridgments on the part not only of the United States, but also of the states, still we should be far from the conclusion that the plaintiff in error would have us reach. In the first place, the main purpose of such constitutional provisions is "to prevent all such *previous restraints* upon publications as had been practiced by other governments," and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.[48]

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42. Patterson v. Colorado, 205 U.S. 454, 463–65 (1907) (Harlan, J., dissenting).

43. *Id.* at 458–59 (majority opinion).

44. W.S. GILBERT & ARTHUR SULLIVAN, THE MIKADO 8 (Josiah Pittman eds., 1885).

45. People v. News-Times Pub. Co., 84 P. 912, 914 (1906) (quoting Editorial, *The Great Judicial Slaughter-House and Mausoleum*, ROCKY MOUNTAIN NEWS (Denver, Col.), June 25, 1905, at 1).

46. *Patterson*, 205 U.S. at 458, 463.

47. It was this rule which had prevented Patterson from attempting to show that his criticisms of the Colorado Supreme Court were justified. *Id.* at 461–62.

48. *Id.* at 462 (quoting Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 313 (1825)). In Fiss's words: "We can see in Holmes's stance . . . in *Patterson* an outlook on free speech fundamentally at odds with *Abrams* [*v. United States*, 250 US 616 (1919)]. Holmes' position [in *Patterson*] undercut First Amendment values as much as his *Abrams* dissent celebrated them." FISS, *supra* note 6, at 328–29.

By contrast, Harlan's dissent anticipated almost every significant development in First Amendment jurisprudence that would take place in the subsequent decades. He first highlighted Holmes' timidity when it came to the question of incorporation:

> Now, the Fourteenth Amendment declares, in express words, that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." As the First Amendment guaranteed the rights of free speech and of a free press against hostile action by the United States, it would seem clear that, when the Fourteenth Amendment prohibited the states from impairing or abridging the privileges of citizens of the United States, it necessarily prohibited the States from impairing or abridging the constitutional rights of such citizens to free speech and a free press.[49]

He then went on to demolish the narrow, feeble view of the First Amendment, which Holmes had just announced:

> But the Court announces that it leaves undecided the specific question whether there is to be found in the Fourteenth Amendment a prohibition as to the rights of free speech and a free press similar to that in the First. It yet proceeds to say that the main purpose of such constitutional provisions was to prevent all such "*previous* restraints" upon publications as had been practiced by other governments, but not to prevent the subsequent punishment of such as may be deemed contrary to the public welfare. I cannot assent to that view, if it be meant that the legislature may impair or abridge the rights of a free press and of free speech whenever it thinks that the public welfare requires that to be done. The public welfare cannot override constitutional privileges, and if the rights of free speech and of a free press are, in their essence, attributes of national citizenship, as I think they are, then neither Congress nor any state, since the adoption of the Fourteenth Amendment, can, by legislative enactments or by judicial action, impair or abridge them. In my judgment, the action of the court below was in violation of the rights of free speech and a free press as guaranteed by the Constitution.
>
> I go further and hold that the privileges of free speech and of a free press, belonging to every citizen of the United States, constitute essential parts of every man's liberty, and are protected against violation by that clause of the Fourteenth Amendment forbidding a State to deprive any person of his liberty without due process of law. It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the Nation or by the States, which does not embrace the right to enjoy free speech and the right to have a free press.[50]

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49. *Patterson*, 205 U.S. at 464 (Harlan, J., dissenting).
50. *Id.* at 464–65.

These prescient words anticipated the famous First Amendment dissents of Holmes and Justice Brandeis by more than a decade.[51]

C. The Reputations of Holmes and Harlan Compared

In light of all of this, one may ask why Holmes enjoys such an exalted status in the American legal pantheon while Harlan, at most, receives an honorable mention for his *Plessy* dissent.[52] After all, Harlan had the courage repeatedly to stand up alone against the white segregationists' instincts, which dominated the Supreme Court in the post-Reconstruction Era and beyond, whereas Holmes' record on this topic is so generally tepid, grudging, and weak that his performance in such cases "will continue to stain his reputation."[53] How, one might ask, could someone who had witnessed the killing fields of Cold Harbor in May 1864 or who had later encountered Lincoln at Fort Stevens in July 1864—as the Union forces rebuffed one of the last stands of the Confederacy on the outskirts of Washington, D.C.—take such a crabbed and disingenuous view of the Thirteenth, Fourteenth, and Fifteenth Amendments in *Giles v. Harris* or those Alabama *Peonage Cases*? Did Holmes really fail to absorb these lessons of the Civil War? Did Lincoln's memorable reflections on the Civil War in his Second Inaugural in March 1865 really mean nothing to him? And while Harlan's dissent in *Patterson* may not have had the shimmering language of *Schenck*, *Abrams*, and *Gitlow*,[54] I believe that it deserves far more recognition than it has heretofore received.[55] The reasons for this are admittedly both complex and a little mystifying, but one may venture the following by way of explanation.

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51. It is scarcely necessary to refer to the extensive literature dealing with this important case-law on *Abrams* and *Schenck v. United States*. *See, e.g.*, Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975); ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 56–90 (New York, 1992); BUDIANSKY, *supra* note 25, at 366–95.

52. *See* Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

53. Thomas Halper, *Justice Holmes and the Question of Race*, 10 BRIT. J. AM. LEGAL STUD. 171, 171 (2021). Following an exhaustive analysis of Holmes' jurisprudential record while on the Supreme Court, Halper concludes that "Holmes was genuinely indifferent to the plight of blacks . . . ." *Id.* at 195.

54. *See* POST, *supra* note 16, at 301 ("Holmes's jewel-like pronouncements….were fundamentally inimitable . . . .").

55. *Cf.* Ronald Collins, *Greater than Holmes? The Life and Legacy of John Marshall Harlan*, SCOTUSBLOG (April 13, 2022, 3:43 PM), https://www.scotusblog.com/2022/04/greater-than-holmes-the-life-and-legacy-of-john-marshall-harlan/ [https://perma.cc/8RUV-96FP] ("Much of Holmes' reputation rests on his role in First Amendment law, for instance, an area where Harlan's legacy is negligible."). This is a very insightful blog post, but I respectfully disagree with those comments.

1. Doctrinal Influence. — First, Harlan did not write *The Common Law* or *The Path of the Law*, the two great works that paved the way for the American Legal Realist movement.[56] These extra-judicial writings of Holmes displayed profound originality of thought, and their influence has been deeply felt throughout the common law world. These works marked him out as a jurisprudential thinker of the first order. With the possible exceptions of Joseph Story and Benjamin N. Cardozo,[57] no other sitting Justice of the U.S. Supreme Court had previously shown themselves through their extra-judicial scholarship to be a legal philosopher of this rank.

2. The Art and Mastery of the Wordsmith. — Second, it is true that Harlan was, by any standards, a very fine legal writer. His judgments in cases such as the *Civil Rights Cases*, *Plessy*, *Berea College*, and *Patterson* resonate through the ages.[58] The coruscating prose of these dissents surely made the majority wince,[59] and they have an elegance and finesse which many of today's dissents might well seek to emulate—with their ritual denunciation of the majority judgments, often in the process using extravagant and hyperbolic language.[60] On the debit side, some of

56. *See* O.W. HOLMES, JR., THE COMMON LAW (1881); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457 (1897).

57. For the writings of Justice Story, see 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (1833); 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE (Charles C. Little & James Brown eds., 1839); Barry Sullivan, Book Review, 32 AM. J. LEGAL HIST. 173 (1988) (reviewing JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (Ronald D. Rotunda & John E. Nowak eds., 1987)). For the writings of Justice Cardozo, see BENJAMIN NATHAN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (Yale Univ. Press ed., 1921); BENJAMIN NATHAN CARDOZO, THE GROWTH OF THE LAW (Yale Univ. Press ed., 1924); Benjamin Nathan Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231 (1939); Charles Clark, Book Review, *Selected Writings of Benjamin Nathan Cardozo*, 57 YALE L.J. 658, 658–66 (1948); RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION (1990).

58. Plessy v. Ferguson, 163 U.S. 537, 552 (1896) (Harlan, J., dissenting); Berea College v. Kentucky, 211 U.S. 45, 58 (1908) (Harlan, J., dissenting); Patterson v. Colorado, 205 U.S. 454, 463–65 (1907) (Harlan, J., dissenting).

59. Thus, in a handsome speech marking Harlan's twenty-five years on the Court in December 1902 David Brewer said of him: "Brother Harlan made a mistake in holding that the Civil Rights Bill was constitutional. . . . But it was a mistake on the side of equal rights, and no act done or word said in behalf of liberty and equality ever fails to touch humanity with inspiring, prophetic thrill." CANELLOS, *supra* note 17, at 391.

60. *See, e.g.*, Webster v. Reproductive Health Servs., 492 U.S. 490, 538 (1989) (Blackmun, J., concurring in part and dissenting in part) ("Never in my memory has a plurality announced a judgment of this Court that so foments disregard for the law and for our standing decisions. Nor in my memory has a plurality gone about its business in such a deceptive fashion.").

the judgments seem to meander a bit before getting to the real point.[61] Yet, good as Harlan was, no one has ever been able to compete with Holmes as the poetic wordsmith of the U.S. Supreme Court.[62]

3. Philosophical Appeal. — Third, Holmes' dissent in *Lochner* rejecting substantive due process challenges to employment legislation won him the unyielding admiration of liberals and progressives, not least when *Lochner* was subsequently abandoned by the Supreme Court in 1937.[63] It is true that Harlan also dissented, but on grounds narrower and less intellectually appealing than Holmes' pithy statement that the Constitution "did not enact Mr. Herbert Spencer's Social Statics."[64] As historian Stephen Budiansky puts it: "Harlan's [dissent] is forgotten; Holmes' is one of the most famous judicial opinions of all time, known to and studied by every law student to this day."[65] An even more serious charge against Harlan is that he never repudiated the *Lochner* substantive due process philosophy. After all, did not Harlan deliver the majority opinion in *Adair v. United States* in which the Court employed *Lochner*-style reasoning to invalidate on freedom of contract grounds the Erdman Act 1898,[66] which, among other things, had sought to prohibit railroads from dismissing employees who had joined a union?

4. Methodological Application. — Fourth, part of the problem may also have been the methodology employed by Harlan in his dissents. While his dissent in *Plessy* reached the same outcome as would later be reached in *Brown v. Board of Education*, the underlying reasoning was perhaps somewhat different. While Warren's opinion in *Brown* rested on substantive equality, Harlan employed a version of substantive due process thinking. This perhaps can be seen more clearly in *Berea College*.[67] Could it not be said that the right of a private corporation to

61. For example, Charles Evans Hughes, who served briefly on the Supreme Court with Harlan, stated that Holmes considered Harlan's opinions to be "verbose." *See* CANELLOS, *supra* note 17, at 402.

62. Depending on your taste, Robert H. Jackson and Harlan the Second take silver and bronze medals, respectively.

63. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 392 (1937) ("This essential limitation of liberty in general governs freedom of contract in particular. More than twenty-five years ago we set forth the applicable principle in these words, after referring to the cases where the liberty guaranteed by the Fourteenth Amendment had been broadly described." (citing Lochner v. New York, 198 U.S. 45 (1905))).

64. *See Lochner*, 198 U.S. at 75 (Holmes, J., dissenting) ("The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics.").

65. BUDIANSKY, *supra* note 25, at 293.

66. Adair v. United States, 208 U.S. 161, 173–80 (1908) (citing *Lochner*, 198 U.S. at 53, 56).

67. Berea College v. Kentucky, 211 U.S. 45, 67 (1908) (Harlan, J., dissenting) ("I am of opinion that, in its essential parts, the statute is an arbitrary invasion of the rights of liberty and property guaranteed by the Fourteenth Amendment against hostile State action, and is therefore void.").

organize integrated education was itself a species of a Fourteenth Amendment liberty interest, just as much as Harlan had held in the case of the "yellow dog" contracts in *Adair* or, for that matter, Justice McReynolds' later judgment in *Meyer v. Nebraska* invalidating laws which prohibited the teaching of foreign languages in parochial schools on classic substantive due process grounds?[68] In Professor Owen M. Fiss's words:

> In *Brown* the evil of Jim Crow was the inequality, or unjustified inequality, understood in substantive terms, not—as it appeared to Harlan in *Plessy,* or for that matter, in *Adair*—an excess of police power or a transgression by the state into the sphere of liberty belonging to the individual. In *Lochner*, Holmes was prophetic as to both result and theory; for Harlan in *Plessy*, only the result was prophetic.[69]

5. Vae Victis. — Fifth (and related to the third and fourth arguments), if history is written by the victors, the same is true of legal history. Here, Holmes has been exceptionally well served by a long list of distinguished admirers—starting with Frankfurter, Learned Hand, John H. Wigmore, and Cardozo—who quickly elevated him to an exalted status. Dazzled by the Holmesian aura, they often failed to look beyond the great dissents in *Lochner* and in some of the post-World War I free speech cases. Thus, for example, Frankfurter's festschrift for Holmes on his ninetieth birthday focuses completely on the positives,[70] with no mention, for example, of *Giles v. Harris* or the Alabama *Peonage Cases*.[71] As Professor Jan Vetter put it, the admirer's view of Holmes "resembles an El Greco painting—recognizable but distorted."[72] Holmes's one-time putative biographer, Grant Gilmore, was even more scathing, saying in *The Ages of American Law* that "[t]he stalwarts of the post-Holmesian orthodoxy took from the master only what suited them; the disturbing and heretical aspects of his thought were ignored."[73]

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68. *See Adair*, 208 U.S 161; Meyer v. Nebraska, 262 U.S. 390 (1923).

69. FISS, *supra* note 6, at 366.

70. FELIX FRANKFURTER, MR. JUSTICE HOLMES, at vii (Coward-McCann ed., 1931).

71. Writing to his friend Maurice Cohen in October 1916, Frankfurter had been more clear-headed about the reality of these *Peonage Cases*:

> Read his [Hughes'] opinion in *Bailey v. Alabama* and see how much better a nose he had for the actual operation of peonage laws in the South than Holmes, whose opinion is more brilliant as an intellectual distillation, but considerably removed from the realities of a modern commercial or agricultural community.

BICKEL & SCHMIDT, *supra* note 40, at 869 (quoting Letter from Felix Frankfurter to Morris Cohen (Oct. 3, 1916)).

72. Jan Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 346 (1984).

73. GRANT GILMORE, THE AGES OF AMERICAN LAW 67 (1974).

Perhaps the best example of this which draws all of this together is Frankfurter's article on the two-hundredth anniversary of the birth of John Marshall in 1955, later published in the *Harvard Law Review*.[74] Contrasting Harlan's approach in *Plessy* with his later comments in *Cummings*, he had the temerity to suggest (more or less) that Harlan was not fully consistent in his attitude to desegregation: "Mr. Justice Harlan floated an oft-quoted epigram [in *Plessy*], but in a few short years did not apply it [in *Cummings*], proving once more that sonorous abstractions do not solve problems with intractable variables."[75]

Frankfurter then scathingly wrote about Harlan's judgment in *Adair*, "Thinking of 'equality' in abstract terms led Mr. Justice Harlan to be blind to the meaning of 'yellow dog' contracts . . . ."[76] Then followed a paean of praise for Holmes and Brandeis. I cannot avoid thinking that this is a somewhat unbalanced judgment—not a word about *Berea College*, the Alabama *Peonage Cases*, or the stark contrast between Holmes and Harlan in *Patterson* was said. And while Frankfurter claimed that *Cummings* had led to *Gong Lum*, he did not mention that (as already noted) neither Holmes nor Brandeis dissented from Taft's judgment in that case; however, if either of them had felt strongly about upholding the constitutionality of segregation measures, they could have. At least Harlan spoke out while they remained silent.

D. Conclusions

The German composer Max Bruch is nowadays almost exclusively remembered for his glorious Violin Concerto no. 1, even though he wrote over 200 other works.[77] Toward the end of his life, however, he could scarcely forbear any mention of that great work as he felt that it overshadowed the rest of his compositional output.[78] Over time Bruch came to resent the fact that he—unlike his contemporaries, Johannes Brahms and Richard Wagner—was judged only by the success of one work and that

74. *See generally* Felix Frankfurter, *John Marshall and the Judicial Function*, 69 HARV. L. REV. 117 (1956).

75. *Id.* at 230. Frankfurter privately believed that, by reason of his opinion in *Cummings*, Harlan's reputation as anti-segregationist with "the liberals" was "undeserved." BRAD SNYDER, DEMOCRATIC JUSTICE: FELIX FRANKFURTER, THE SUPREME COURT, AND THE MAKING OF THE LIBERAL ESTABLISHMENT 605 (2022).

76. Frankfurter, *supra* note 74, at 230 (first quoting Adair v. United States, 208 U.S. 161, 175 (1908); and then citing Richard Olney, *Discrimination Against Union Labor—Legal?*, 42 AM. L. REV. 161 (1908)).

77. *See* CHRISTOPHER FIFIELD, MAX BRUCH: HIS LIFE AND WORKS (2005) (discussing Bruch's music pieces including Violine Concerto no. 1 in G minor, Op. 26).

78. *See id.* at 76 ("[The Concerto's fame] put all his other music in its shadow, and in time he became seriously concerned and genuinely upset by the unbalanced adulation the work was receiving.").

his standing in the musical world suffered as a result. The shade of John Marshall Harlan the First, in the words of Peter S. Canellos, the original "great dissenter," could justly be forgiven for entertaining similar feelings with regard to *Plessy v. Ferguson*: his great dissent in that case has overshadowed the rest of his judicial output. Has not the time come for a bit of spring-cleaning in the revered halls of the American legal pantheon so that Harlan is remembered for more than just one celebrated dissent?

II. COMPARING FELIX FRANKFURTER AND THE SECOND HARLAN

If we could transport ourselves back to the Supreme Court chamber on January 30, 1939, one could imagine that few of the dignitaries who assembled for the swearing-in ceremony of a new Justice would have doubted that the new appointee would, in the fullness of time, take pride of place as one of the greats of the Court along with Marshall, Holmes, and Brandeis. There was every reason to expect so much from Felix Frankfurter. He was perhaps the most accomplished constitutional law scholar of his generation, a professor at Harvard Law School, and a friend of the Roosevelts, Holmes, Brandeis, Acheson, Stimson, and many more besides.[79] And yet Frankfurter's jurisprudence has largely remained out of favor and is nowadays distinctly unloved. As Professor Melvin I. Urofsky quoted a critic's caustic words, for all practical purposes, Frankfurter's opinions "might as well have been written on paper airplanes and thrown out a Supreme Court window."[80] Even if you think these comments are too harsh—is not Frankfurter's concurrence in the *Steel Seizure Case*[81] much admired?—no one can pretend that Frankfurter has had an indelible influence on all strands of subsequent judicial opinion in the way that Holmes, Brandeis, and, more latterly, Robert H. Jackson, and Harlan the Second have had.

79. Frankfurter worked with (then) U.S. Attorney Henry L. Stimson in the Southern District of New York and later followed him to the War Department. *See* SNYDER, *supra* note 75, at 29–30. While at the War Department, Frankfurter met and became friendly with the (then) Assistant Secretary of the Navy, Franklin Delano Roosevelt. *Id.* at 97–100.

80. MELVIN I. UROFSKY, DISSENT AND THE SUPREME COURT: ITS ROLE IN THE COURT'S HISTORY AND THE NATION'S CONSTITUTIONAL DIALOGUE 231 (2015).

81. *See* Youngstown Sheet & Tube Co. v. Sawyer (*Steel Seizure*), 343 U.S. 579, 393 (1952) (Frankfurter, J., concurring). Frankfurter's comments regarding the scope of Presidential authority "rightly caught the practice of government as well as its theory." UROFSKY, *supra* note 80, at 255.

Perhaps it is an issue of taste and fashion. Just as with the arts, judicial reputations are contestable and fluid.[82] Like composers and writers, the standing of judges tends to go in and out of fashion. Justices Brennan, Douglas, and Marshall were the judicial heroes of many a generation ago. John M. Harlan II seemed a slightly exotic figure, out of step with the dynamics of the Warren Court. Nowadays, Harlan's standing has rarely been higher, and a range of Supreme Court nominees widely quoted him as their favorite and most admired Justice.[83] Why has he come into favor over the last two to three decades? And why has this been achieved when the jurisprudence of another moderate liberal from an admittedly slightly earlier generation, Felix Frankfurter, remains largely unloved? After all, one might have thought that Frankfurter—arguably the nation's greatest constitutional law scholar of the 1920s and '30s—had all the credentials to impact the jurisprudence of the Supreme Court.

So, what happened? Why has Frankfurter's star remained somewhat dimmed while Harlan's standing has never been higher? If one excludes all living Justices, then in the post-World War II period, only Jackson and Harlan can be regarded as being placed in the highest echelon of truly great Justices, joining Marshall, Story, Holmes, Brandeis, and Cardozo. Others such as Harlan I, Hughes, Stone, Ruttledge, Warren, Douglas, Brennan, Black, Marshall, and Scalia have their various claims. One could, in fairness, add Frankfurter to that second list. Yet no one is, I think, going to suggest that Frankfurter matches Harlan in terms of long-term influence or reputation as a great judge.[84]

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82. *See* Gary Allen Fine, *Moral Cultures, Reputation Work, and the Politics of Scandal*, 45 ANN. REV. SOCIO. 247, 249 (2019) ("[W]e must interpret scandals and reputation through contested (or contestable) moral narratives that make communal cultures explicit." (citations omitted)).

83. These include Sandra Day O'Connor and David Souter. *See* EDWARD LAZARUS, CLOSED CHAMBERS 470 (Penguin Books, 1999) ("Like Souter, O'Conner revered Justice Harlan . . . ."); UROFSKY, *supra* note 80, at 352 ("[O]n several occasions Souter expressed admiration for Harlan. At his confirmation hearings, when asked about Harlan's separate opinion in *Griswold*, Souter forthrightly said he agreed chat 'the due process clause . . . does recognize and protect an unenumerated right of privacy.'"). In Lazarus's words, Harlan was "the conservative patron saint of the common law tradition." LAZARUS, *supra* at 342. This may possibly reflect that the majority of Harlan's legal training was in Oxford rather than in the United States.

84. There is a considerable—but by no means complete—overlap with this (purely personal) list of great Justices with the more authoritative list produced by Professors Blaustein and Mersky in 1972. *See* Albert P. Blaustein & Roy M. Mersky, *Rating Supreme Court Justices*, 58 AM. BAR ASS'N J. 1183, 1183 (1972). This list was compiled following a survey of "[s]ixty-five law school deans and professors of law, history and political science who deal with constitutional law . . . ." *Id.* The Blaustein and Mersky list had Harlan I, Holmes, and Frankfurter listed as "great," while Harlan II was listed as "near great." *Id.* at 1183–85. It is, however, of interest that they also record that "one of the law professors rated Frankfurter not great but a failure. He termed Frankfurter 'consistently overrated', the point being that he used his brilliance to restrict the development of the law." *Id.* at 1184.

There are essentially four reasons why Harlan has acquired that reputation in a way, I suggest, that Frankfurter has not. First, Harlan mastered the art of judicial review—specifically, substantive due process—in a way that Frankfurter never quite did.[85] Frankfurter was, after all, a judicial review skeptic while Harlan clearly was not. Second, Harlan was a gifted and elegant writer whose easy and direct style contrasts with the sometimes-ponderous style of Frankfurter.[86] Third, Harlan was clearly a highly principled judge who was scrupulous in adhering to traditional common law limitations of the judicial power, particularly stare decisis.[87] Frankfurter was also concerned with institutional limitations of judicial power—perhaps it might be accurate to say that he was *too* concerned with these limitations. But there was also something false about how Frankfurter set about applying Professor Alexander Bickel's "passive virtues" to many of the constitutional issues of the day.[88] Finally, aspects of Frankfurter's personality showed a Shakespearian character flaw, which beset the quality of his judicial output. These are large themes upon which I can but lightly touch; I take just a few examples to illustrate my argument.

A. Frankfurter's Concerns with Substantive Due Process

Frankfurter fretted about the legitimacy of the power of judicial review of legislation his entire adult life. When the draft Irish Free State Constitution was published in the summer of 1922, Frankfurter was intrigued that another common law country had expressly provided for a system of judicial review and fundamental rights protections in its first Constitution upon independence. He wrote, on Harvard Law School notepaper, on August 10, 1922, to Lionel Curtis—an influential British civil servant associated with the 1921 Anglo-Irish Treaty—to inquire about why the

85. *But see* Anthony C. Cicia, Note, *A Wolf in Sheep's Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation*, 64 FORDHAM L. REV. 2241, 2277–83 (1996) (critiquing Justice Harlan's substantive due process formulation as restrictive and claiming its acceptance was "dangerous to an expansive concept of liberty").

86. In fairness, it must be recalled that Frankfurter arrived in the United States at the age of eleven without a word of English. SNYDER, *supra* note 75, at 9.

87. Even though Harlan dissented in *Miranda v. Arizona*, he nonetheless regarded himself as bound by that decision. Miranda v. Arizona, 384 U.S. 436, 504 (1966) (Harlan, J., dissenting). Accordingly, when the majority effectively refused to follow *Miranda* in one case, Harlan found himself "in the uncomfortable position of having to dissent from a holding which actually serves to curtail the impact of that [*Miranda*] decision." Jenkins v. Delaware, 395 U.S. 213, 222 (1969).

88. For example, Frankfurter's behind the scenes scheming in *Naim v. Naim* to ensure that the Court did not get to rule on the validity of Virginia's inter-racial marriage on the basis that it was too soon after *Brown v. Board of Education* for such a (then) sensitive and controversial issue to be considered by the Court. *See* SNYDER, *supra* note 75, at 612–15 (referring to Naim v. Naim, 350 U.S. 985 (1956)).

newly independent Irish State was taking this slightly radical step: "[T]he most arresting step in the Irish Free State Constitution . . . ." [89] Curtis sent a copy of the letter to Hugh Kennedy, then legal adviser to the fledgling Irish Provisional Government (later Attorney General and first Irish Chief Justice[90]), asking him to reply to Frankfurter.[91] While there is a copy of the letter in the Kennedy papers in the Archives Department at University College Dublin, it does not appear that there was ever a response—probably because the Irish Civil War started in June of 1922, and Kennedy had many other more pressing things to attend to. Nevertheless, this minor incident shows Frankfurter's anxieties in this regard.

Yet, in a curious way, Frankfurter's letter also holds a small key to this wider mystery. Read in conjunction with his subsequent 1955 Harvard lecture on the two-hundredth anniversary of the birth of John Marshall, one can see a deep unease with the very idea of judicial review of legislation, particularly, as the lecture makes clear, with the idea of substantive due process.[92] In that lecture, Frankfurter asserted with dogmatic authority that no other country had adopted the U.S. style of substantive due process.[93] But that is not entirely correct. Ireland adopted a full-scale expansive version of it with the Constitution of 1937 and, perhaps more importantly, India followed the wording of the Irish model (albeit with some modifications) with its Constitution of 1950, such that the Indian constitutional protection is confined to "personal liberty" as distinct from "liberty" simpliciter.[94] One might have thought that Frankfurter would

89. LAURA CAHILLANE, DRAFTING THE IRISH FREE STATE CONSTITUTION 169 n.71 (2016) (citing Gerard Hogan, Development of Judicial Review of Legislation and Irish Constitutional Law 1929–1941 (Ph.D. thesis, Trinity College Dublin, 2001) (on file with author)).

90. From 1924 until his death in 1936. RUADHÁN MAC CORMAIC, THE SUPREME COURT: THE JUDGES, THE DECISIONS, THE RIFTS AND THE RIVALRIES THAT HAVE SHAPED IRELAND 190–35 (2016).

91. CAHILLANE, *supra* note 89, at 169 n.71.

92. Frankfurter, *supra* note 74, at 228 ("In relation to the judiciary's task in the type of cases I am now discussion [due process], I am raising difficulties which I think must in all good conscience be faced . . . .").

93. *Id.* at 232 ("Much as the constitution makers of other countries have drawn upon our experience, it is precisely because they have drawn upon it that they have, one and all, abstained from including a 'due process' clause." (citing Wallace Mendelson, *Foreign Reactions to American Experience with Due Process of Law*, 41 VA. L. REV. 493 (1955))).

94. *See* India Const. art. 21. ("No person shall be deprived of his life or personal liberty except according to a procedure established by law."). This clause has subsequently been interpreted by the Indian Supreme Court as embracing a wide range of implied rights using substantive due process style reasoning. *See, e.g.*, Maneka Gandhi v. Union of India, AIR 1978 SC 597 (defining Article 21 as a "recognition and declaration of rights which inhere in every individual" and reasoning that unjustifiable government actions cannot inhibit the scope of an individual's fundamental rights); *see also* Unni Krishnan v. State of Andhra Pradesh, AIR 1993 SC 2178 ("The word 'life' occurring in Article 21 too has received a broad and expansive interpretation.").

have known all of this, not least because he had extensive discussions on this very subject with the principal drafter of the Indian Constitution, B. N. Rau, when the latter came to Washington in November of 1947. Frankfurter had warned Rau that following the substantive due process model was essentially not compatible with democracy by reason of the potential power it vested in the judiciary.[95] One cannot help thinking that his comments in the Harvard Marshall lecture reflected what Frankfurter *wanted to be true*, even though a moment's research would have shown that these comments were, at least, not entirely accurate.

While this is a small point of detail perhaps, one must nonetheless observe that all of this shows an unhappy aspect of his judicial temperament—a sort of preening judicial dogmatism and an intolerance for those who did not share, or at least wish to learn, his own judicial philosophy. It is no wonder that this characteristic did not go down well with his colleagues "who resented the professor's condescending manner," as his dream of leading the Court "slipped away, Frankfurter grew nastier and his temper shorter."[96] Although he was a personally kind and thoughtful man, a lack of humility and grace seems to have affected the quality of his judicial opinions;[97] it is impossible not to be put off by their somewhat hectoring tone, their verbosity, and extensive quotation of (not always) relevant authority in comparison with the parsimonious elegance of Holmes and, indeed, Robert H. Jackson.

B. Frankfurter's Inflexibility and Judicial Record

Frankfurter's objections to substantive due process were, and are, fully understandable. He, after all, had in the 1923 opinion, *Adkins v. Children's Hospital*,[98] seen the Court invalidate minimum wage legislation enacted by Congress for the District Court of the District of Columbia as contrary to the Due Process Clause of the Fifth Amendment, despite his best efforts as counsel.[99] And the activities of the "Four Horsemen"—

95. *See generally* ROHAN J. ALVA, LIBERTY AFTER FREEDOM: A HISTORY OF ARTICLE 21, DUE PROCESS AND THE CONSTITUTION OF INDIA (2022).

96. UROFSKY, *supra* note 80, at 232.

97. *See id.* at 345 ("Everyone liked Harlan, who had none of the acerbity that marked Frankfurter's personality and poisoned his relations with other members of the Court. William O. Douglas, who often voted against Harlan's opinions, nonetheless had nothing but nice things to say about him in his memoirs and put Harlan on the roster of the great judges with whom he had served.").

98. Adkins v. Children's Hospital, 261 U.S. 525 (1923), *overruled by* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937).

99. SNYDER, *supra* note 75, at 137. He had as counsel previously endured McReynold's surly taunts "in a sneering tone" from the bench when successfully defending an Oregon maximum hours of employment statute. *See* Bunting v. Oregon, 243 U.S. 426, 436 (1917) (holding that the Oregon law did not violate constitutional limits because it was a matter of legislative judgment); *see also*

Justices Butler, McReynolds, Sutherland, and Van Devanter—up to the decision in *West Coast Hotel v. Parrish*, suggested that no item of regulatory or social legislation was safe in their hands.[100] But Frankfurter took all of this too far. The protection of individual liberty has profound roots in the American political and legal tradition. One could not cast this tradition completely aside simply because a clique of reactionary judges had abused it.

In any event, had Justice Stone not shown the way forward in 1938 with his famous *Footnotes 3* and *4* in *United States v. Carolene Products*, suggesting a differential standard of review,[101] with heightened scrutiny of legislation affecting discrete and insular minorities or legislation impeding the proper functioning of the democratic process? But Frankfurter was, I fear, too blinded by his own passionate legal and political dogmas to navigate his way forward. This was illustrated by Frankfurter's decision in the first flag salute case, *Minersville School District v. Gobitis* in June, 1940.[102] Here, a local school board expelled the children of Jehovah's Witnesses who had refused on religious grounds to pledge allegiance to the flag.[103] Frankfurter held that the school district's interest in fostering national unity was enough to allow the district to require students to salute the flag.[104] The loyalty and the unity of the citizenry were important goals.[105] Since saluting the flag was a primary means of achieving this legitimate goal, an issue of national importance was at stake. Thus, the state's interest in "national cohesion" was "inferior to none in the hierarchy of legal values."[106] The recitation of the Pledge of Allegiance thereby advanced the cause of patriotism.[107]

HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES: RECORDED IN TALKS WITH DR. HARLAN B. PHILLIPS 112 (Reynal & Company 1960); BUDIANSKY, *supra* 25, at 361–62.

100. *See West Coast Hotel*, 300 U.S. at 388–89, 391 (1937) (explaining the Court's recent history of holding state minimum wage laws as invalid).

101. *See* United States v. Carolene Products, 304 U.S. 144, 152 n.4 (1938) ("There may be a narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution . . . .").

102. *See* Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), *overruled by* West Virginia State Bd. Educ. v. Barnette, 319 U.S. 624 (1943).

103. *Id.* at 591–92.

104. *See id.* at 595 ("National unity is the basis of national security. To deny the legislature the right to select appropriate means for its attainment presents a totally different order of problem . . . .").

105. *See id.* at 596 ("The ultimate foundation of a free society is the binding tie of cohesive sentiment.").

106. *Id.* at 595.

107. *See id.* at 596 (explaining that the cohesive sentiment, such as the one that stems from the Pledge of Allegiance "may . . . create that continuity of a treasured common life which constitutes a civilization.").

The flag, he reasoned, was an important symbol of national unity and could be a part of legislative initiatives designed "to promote in the minds of children who attend the common schools an attachment to the institutions of their country."[108] Concluding, he observed that "to the legislature no less than to the courts is committed the guardianship of deeply cherished liberties."[109]

Frankfurter was very proud of this decision. In one sense, it is admirable for a judge to respect the self-denying ordinance of ensuring that one does not find a law unconstitutional simply because the law in question is repugnant—even deeply repugnant—to one's personal beliefs. Yet one might ask: what is the purpose of the Bill of Rights if the courts will not intervene and protect the rights of religious minorities? Besides, there was, and is, no answer to Stone's dissent and his objection that "by this law[,] the state seeks to coerce these children to express a sentiment . . . which violates their deepest religious convictions."[110] Professor Brad Snyder recounts how Frankfurter's law clerks were deeply opposed to his judgment in *Gobitis*, and they agreed that their judge "was ruining himself and sacrificing any chance of leading the Court."[111]

History has vindicated that assessment because, in some ways, Frankfurter's judicial standing never recovered from that decision. Of course, as is well known, *Gobitis* itself was swiftly overruled three years later in the second flag salute case, *West Virginia School Board of Education v. Barnette*.[112] Jackson's statement for the majority—to the effect that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein"[113]—is one of the most celebrated judicial pronouncements in the Court's history; and is, I suggest, a benchmark by which every free and democratic society should judge itself. By contrast, Frankfurter's highly personalized dissent adhering to the original judgment in *Gobitis* has "generally been derided as blind to the meaning of the First Amendment."[114]

108. *See id.* at 596 ("The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution.").

109. *Id.* at 600.

110. *Id.* at 601 (Stone, J., dissenting).

111. SNYDER, *supra* note 75, at 359.

112. West Virginia State Bd. Educ. v. Barnette, 319 U.S. 624 (1943).

113. *Barnette*, 319 U.S. at 642.

114. UROFSKY, *supra* note 80, at 246.

Certainly, Frankfurter has a wonderful biographer in Professor Snyder,[115] but even he seems to endorse Learned Hand's end-of-career assessment that Frankfurter somehow lacked the magic and the star quality of the outstanding judicial greats: "He's learned a good deal of it. But he hasn't [got] it."[116] While Snyder's outstanding book will doubtless assist in any reassessment of the Frankfurterian legacy, it seems for the moment, at least, that there are unlikely to be few new converts.

C. Comparing Frankfurter and the Second Harlan

This is where Frankfurter stands in comparison with Harlan. Unlike Frankfurter, Harlan mastered the concept of substantive due process. Just as importantly, Harlan's judgments displayed a courteous humility, a fidelity to precedent,[117] and an elegance of style,[118] which those who had assembled in that Supreme Court chamber in January of 1939 had every reason to expect of Frankfurter, but which somehow did not ultimately materialize. Again, considerations of space permit just a few examples to be given, so I focus on just two: *Cohen v. California* and *Poe v. Ullman*.[119]

In *Cohen*, a young man walked through a Los Angeles courthouse corridor on his way to give evidence in a particular case.[120] He was subsequently arrested and charged with disturbing the peace through "offensive conduct" due to his jacket emblazoned with vulgar words denouncing the draft.[121] Cohen's counsel, Professor Melville Nimmer of the UCLA Law School, famously uttered the offending words to the chagrin of the then Chief Justice Burger.[122]

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115. Synder authored Frankfurter's biography entitled *Democratic Justice: Felix Frankfurter, the Supreme Court and the Making of the Liberal Establishment*. *See* SNYDER, *supra* note 75.

116. *Id.* at 680 (quoting Joseph P. Lash, *A Brahmin of the Law: A Biographical Essay*, *in* FROM THE DIARIES OF FELIX FRANKFURTER 3, 77 (1975)).

117. *See* Henry J, Bourguignon, *The Second Mr. Justice Harlan: His Principles of Judicial Decision Making*, 1979 SUP. CT. REV. 251, 277 (1979) ("Harlan realized that judicial precedents of the Court can no more be irrevocably binding than can other aspects of historical tradition.").

118. *See* LAZARUS, *supra* note 83, at 336 ("Harlan's *Poe* dissent, notable for its eloquence and the much-admired conservatism of its author, was the crucial turning point in the creation of the modern constitutional right to privacy.").

119. Cohen v. California, 403 U.S. 15 (1971); Poe v. Ullman, 367 U.S. 497 (1961).

120. *Cohen*, 403 U.S. at 16.

121. *Id.* ("[P]rohibit[ing] 'maliciously and willfully disturb[ing] the peace or quiet of any neighborhood or person . . . by . . . offensive conduct . . . .'" (quoting CAL. PENAL CODE § 415 (1970))).

122. In fairness, it should be stated that according to Anthony Lewis, Burger "may have been particularly sensitive because a group of nuns were there [in the Supreme Court chamber] that day." ANTHONY LEWIS, FREEDOM FOR THE THOUGHT THAT WE HATE 131 (2007).

Harlan's majority judgment is a classic. In the context of the Vietnam War, the statements on the jacket, "the unseemly expletive," were held to be simply a form of political protest. As Harlan put it, one person's "vulgarity is another's lyric."[123] And with soaring eloquence, Harlan uttered words that echo Brandeis's famous dissent in *Whitney v. California*[124]:

> The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decisions as to what views shall be voiced largely into the hands of each of us, in the hope that the use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.[125]

This passage takes its place as one of the finest expositions of the reasons for the First Amendment in the first place.[126]

The other example is Harlan's dissent in *Poe*.[127] Here, the plaintiffs sought to challenge the, then rarely enforced, Connecticut anti-birth control statute.[128] Frankfurter's majority opinion dismissed the claim as presenting no Article III case or controversy because the plaintiff had neither been prosecuted nor threatened with prosecution.[129] Harlan's dissent would not accept this dismissal on lack of standing grounds, saying that all that stood between "the appellants and jail is the legally unfettered whim of the prosecutor and the Constitutional issue this Court today refuses to decide."[130] Harlan then waded out into the merits of the statute and addressed the issue of substantive due process:

> Due process has not been reduced to any formula; its content cannot be determined by reference to any code. The best that can be said is that through the course of this Court's decisions it has represented the balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of

123. *Cohen*, 403 U.S. at 25.

124. *See* Whitney v. California, 274 U.S. 357, 375–77 (1927) (Brandeis, J., concurring) (describing the importance of freedom of speech to the general ideals of freedom fought for by those who won American independence), *overruled by* Brandenburg v. Ohio, 395 U.S. 444 (1969).

125. *Cohen*, 403 U.S. at 24.

126. *See, e.g.*, William W. Van Alstyne, *The Enduring Example of John Marshall Harlan: "Virtue as Practice" in the Supreme Court*, 36 N.Y.U. L. REV. 109, 119–20 (1991) ("The appreciation of First Amendment core principles is represented as straightforwardly in Harlan's opinion in *Cohen* as in the best opinions decades earlier by Holmes and Brandeis.").

127. Poe v. Ullman, 367 U.S. 497, 522–55 (1961) (Harlan, J., dissenting).

128. *Id.* at 498 (majority opinion).

129. *See id.* at 501–02 ("During the more than three-quarters of a century since [the statute's] enactment, a prosecution for its violation seems never to have been initiated . . . .").

130. *Id.* at 537 (Harlan, J., dissenting).

> organized society. If the supplying of content to this Constitutional concept has of necessity been a rational process, it certainly has not been one where judges have felt free to roam where unguided speculation might take them. The balance of which I speak is the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke. That tradition is a living thing. A decision of this Court which radically departs from it could not long survive, while a decision which builds on what has survived is likely to be sound. No formula could serve as a substitute, in this area, for judgment and restraint.[131]

Harlan continued:

> It is this outlook which has led the Court continuingly to perceive distinctions in the imperative character of Constitutional provisions, since that character must be discerned from a particular provision's larger context. And inasmuch as this context is one not of words, but of history and purposes, the full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[132]

It was only a short step from there to conclude that privacy was part of the Fourteenth Amendment's liberty interest, and that the Connecticut statute was unconstitutional.

Harlan's dissent in *Poe* remains the most memorable exposition of substantive due process that has ever been provided—appealing as it does to the various claims of text, history, and tradition. By encompassing this within the parameters of "liberty" contained in the Fourteenth Amendment, Harlan essentially draws on a long strain of natural law thinking within American legal and political thinking: the idea that there are certain rights that are fundamental to a free society which enjoys protection, even if these rights are not always found in express terms in the text of the Bill of Rights or the Constitution itself. His incremental, case-by-

131. *Id.* at 542.

132. *Id.* at 542–43 (citations omitted). *See also* LAZARUS, *supra* note 83, at 338 ("Embedded in this flexible approach was a sizable element of judicial discretion, the idea that judges had both the ability and the authority to discern from history and tradition basic standards of justice that government was compelled to recognize and leave inviolate.").

case approach essentially seeks to apply the common law method to constitutional interpretation while minimizing the role of judicial subjectivity. It was indeed a remarkable opinion because Harlan had almost single-handedly revivified "substantive due process, an idea that justices like Frankfurter, with memories of the bad old days, found frightening."[133]

There is, of course, a much wider debate as to whether this is legitimate in a democratic society or whether it is an illusion to think that substantive due process can ever be applied in the detached, methodical fashion described by Harlan.[134] What is certain is that the *Poe* dissent has framed the intellectual parameters of the subsequent debates on the issues of judicial legitimacy, the role of the Supreme Court, whether the right to privacy is constitutionally protected, and, if so, whether it embraces contentious issues such as abortion and the right to die.[135] What can be asserted with confidence is that irrespective of one's views on these issues, no one has ever expressed a more coherent exposition of the role and value of substantive due process in the U.S. constitutional tradition than John M. Harlan II. For that alone, he is entitled to recognition as one of the judicial greats.

D. Conclusions

Perhaps the finest tribute one can pay to the second Harlan is to say that he was the great Justice that Frankfurter could and should have been. Perhaps having been too critical of Frankfurter's judicial output, it is only right to say that in his career, he did much that was wholly admirable—one thinks here of his courageous dissent in the atomic secrets' treason case, *Rosenberg v. United States*, and his insistence on the right to a fair trial and due process.[136] Yet in a way there was a Shakespearean character flaw to his array of talents: vanity, dogmatism, and the bitterness of personal experiences often seemed to blind him to the values of the Bill

133. UROFSKY, *supra* note 80, at 346.

134. This is an immense topic in its own right and it lies well beyond the scope of this Article. In essence, it is the history of a key part of US constitutional law. *Compare* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L.J. 920, 930 (1973) (arguing generally that the Harlan reasoning cannot apply to all cases), *with* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2326 (2022) ("[A]pplications of liberty and equality can evolve while remaining grounded in constitutional principles, constitutional history, and constitutional precedents.").

135. Jurists and judges as diverse as William Douglas, William Rehnquist, Harry Blackmun, Sandra Day O'Connor, David Souter, Clarence Thomas, and Samuel Alito have all had their say in this debate.

136. *See* Rosenberg v. United States, 346 U.S. 273, 301–10 (1953) (Frankfurter, J., dissenting).

of Rights[137] and the essential role of the judge in protecting the rights of minorities and other less popular causes. As Harlan showed, there is a way to protect those rights while ultimately reinforcing the democratic process at the same time. Snyder recounts how, in the last personally difficult years of his life, Frankfurter, "[t]he justice who radiated optimism[,] was becoming bitterly negative about everyone and everything."[138] Part of this was doubtless the vicissitudes of old age. But I suggest that there was another force at work.

His mentor and friend, Holmes, had been lucky. Thanks to the various urgings of Frankfurter, Learned Hand, and others, Holmes changed course in his seventies. In his old age, he finally found themes in his work—free speech, the proper scope of the Fourteenth Amendment, and the role of the common law in the federal system—which gave meaning to his judicial role and assured his place in the American legal pantheon. Frankfurter was not quite so fortunate. He never fully recovered from his disastrous judgment in *Gobitis*, and he would not listen to or heed those who urged a different approach. Frankfurter yearned for judicial greatness, and one may suspect that in his old age, he realized that this great prize had eluded his grasp. In Urofsky's words, there, indeed, is a "bitter sadness" in Frankfurter having become a prisoner of his own jurisprudential theories such that this rigidity denied him "flexibility or room for change and maneuver."[139] The tragedy for him, and us, was that he could easily have achieved this goal with a bit more humility and less dogma.

137. Outside the realm of procedural due process where his legacy in ensuring fairness was, generally speaking, exemplary. *See, e.g.*, Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 150, 172–73 (1951) (Frankfurter, J., concurring) (arguing that the case involved bigger issues that applied by the Court, specifically that the petitioners' due process rights were violated).

138. SNYDER, *supra* note 75, at 699.

139. Melvin I. Urofsky, *The Failure of Felix Frankfurter*, 26 U. RICH. L. REV. 175, 194 (1991).